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Supreme Court, U.S.
FILED
AUG 27 1997
CLERK

No. 97-157

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES EX REL. D.J. FINDLEY,
Petitioner,

v.

FPC-BORON EMPLOYEES' CLUB, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

15 pp

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OPINIONS BELOW

The opinion of the court of appeals is reported at 105 F.3d 675 (D.C. Cir. 1997), and is reprinted in petitioner's appendix ("Pet. App.") at 3a-31a. The order denying petitioner's petition for rehearing is reprinted in petitioner's appendix at 1a-2a. The district court's opinion and order dismissing this case is unreported but is reprinted in petitioner's appendix at 34a-41a.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1997 (Pet. App. 32a-33a). The petitioner's petition for rehearing was denied by the court of appeals on March 18, 1997 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on June 16, 1997. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent statute involved is 31 U.S.C. § 3730 (e)(4)(A) and (B). It provides:

> (e) Certain actions barred—
>
> . . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

1. This case arises under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq.*, and presents issues concerning that Act's public disclosure bar. 31 U.S.C. § 3730(a)(4)(A). The facts are generally not in dispute. The case stems from a controversy over a federal employee organization's contract to supply vending machines at the Federal Prison Camp in Boron, California ("FPC-Boron").

The FPC-Boron Employees' Club is an organization of federal employees employed at FPC-Boron. Like numerous other federal prison employee groups in the United States, the FPC-Boron Employees' Club operates primarily

as a recreational and morale-boosting entity for its federal employee members. The Bureau of Prisons ("BOP") has officially sanctioned and recognized the importance of such employee clubs:

> [t]he intent of employee organizations within the BOP is to provide and develop for our employees a support system for the "Bureau Family" by having activities that allow employees and their families to work together toward the completion of a project or enjoy the activity being sponsored.

BOP Program Statement 3721.04 (Feb. 24, 1992). Recognizing that employee clubs require a source of income in order to operate, the BOP further provides in its Program Statement:

> [t]o support these activities, employee organizations raise funds to defer the cost of the projects/activities. The intent of fund raisers is to have sufficient funds to offset the expenses of programs offered, not to create large reserves or to have large business organizations. Ideally these organizations have nominal reserves from one year to another.

Id.

The Program Statement specifically authorizes that employees' clubs may keep certain profits from vending machines located at the federal prison facility. The Program Statement divides vending machines into three groups: (1) vending machines located in visiting rooms used by inmates and visitors (Class 1); (2) vending machines located in areas where inmates have no access, such as staff lounges and other employee areas (Class 2); and (3) vending machines located in prison common areas for use primarily by the inmates (Class 3).

The BOP Program Statement allocates responsibility for the maintenance of Class 1 and 2 vending machines to employees' clubs. The clubs, however, may retain all profits generated by Class 2 vending machines and eighty-five percent of the profits generated by Class 1 vending

machines. *Id.* The remaining fifteen percent of those profits go to the BOP. *See also* BOP Institution Supplement 3721.04 (March 9, 1994). The BOP itself is responsible for Class 3 vending machines and retains all profits generated by them. The BOP deposits all of the profits from the Class 3 vending machines plus the fifteen percent from the Class 1 machines into a Trust Fund maintained by BOP to purchase recreational equipment for inmates. Pet. App. 35a. *See also Premiere Vending*, B-256560, 73 Comp. Gen. 213 (1994).[1]

2. In September 1993, the BOP issued a Request for Proposals to provide vending food services for the six inmate (Class 3) vending machines. At a pre-proposal conference for prospective offerors, members of the FPC-Boron Employees' Club distributed copies of a separate procurement for maintaining and servicing the eleven employee and visitor lounge (Class 1 and Class 2) vending machines. *Id.* at 214. One of the offerors present was Premiere Vending, of which petitioner is a senior official. On December 30, 1993, petitioner, on behalf of Premiere Vending, wrote to BOP and questioned the authority of the FPC-Boron Employees' Club to conduct a procurement for the eleven Class 1 and 2 vending machines. *Id.* After the FPC-Boron Employees' Club awarded the contract for its vending machines to one of Premiere Vending's competitors, Premiere Vending protested with the General Accounting Office ("GAO") arguing, *inter alia*, that the award violated the Competition in Contracting Act ("CICA"), 41 U.S.C. § 253, *et seq.* On July 5, 1994, GAO rejected that and Premiere Vending's other arguments. *Premiere Vending.*[2]

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[1] FPC-Boron has seventeen vending machines. Six are located solely in the inmate areas primarily for the use of the FPC-Boron inmates. The remaining eleven are located in the employee and visitor lounge areas. 73 Comp. Gen. at 214; Pet. App. 35a.

[2] Premiere Vending filed a separate, but similar, protest with GAO challenging the terms of requests for proposals to supply

The very next day, petitioner and another Premiere Vending official filed this action under seal in the United States District Court for the District of Columbia as a putative *qui tam* class action. Pet. App. 5a, 36a. Petitioner and his co-relator asserted that the failure of BOP employee organizations to deposit into the United States Treasury profits from the Class 1 and 2 vending machines (as opposed to keeping those monies) violates the False Claims Act and various other civil and criminal statutes. The United States declined to intervene as plaintiff and the complaint was unsealed. *See* 31 U.S.C. § 3730; Pet. App. 5a.

Respondents promptly filed a motion to dismiss arguing, *inter alia*, that 31 U.S.C. § 3730(e)(4) deprives the district court of subject matter jurisdiction since the allegations or transactions that form the basis of the complaint have already been "publicly disclosed" and petitioner and his co-relator are not the "original source" of the information. Specifically, respondents argued that the retention of vending machine income by federal employee organizations is information that has been in the public domain for many years and petitioner and his co-relator are not the "original source" of the information.

The district court (the Honorable Norma Holloway Johnson) agreed and dismissed the complaint. Pet. App. 34a-41a. The court held that 31 U.S.C. § 3730(e)(4) is a subject matter jurisdiction provision that establishes a two-part test: (1) whether the subject matter of the suit has been "publicly disclosed;" and (2) whether the relator was the "original source" of the information. If the information has been publicly disclosed and the relator is not the original source, subject matter jurisdiction is lacking and the case must be dismissed. Pet. App. 36a.

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vending machines at the Federal Prison Camp in Dublin, California. On June 23, 1994, GAO similarly denied that protest. *See Premiere Vending*, B-256437, 73 Comp. Gen. 201 (1994).

Applying the two-part test, the district court determined first that the subject matter of this action has long been publicly disclosed via a variety of avenues specified in the statute, such as through a "congressional report," a "civil hearing," and a "Government Accounting Office report." Pet. App. 39a. The court held:

> Before the filing of this action, enough information was in the public domain to expose the allegation that government employees are perpetrating a fraud upon the government by maintaining vending machines on Federal property. The government itself could have brought an action against employees' clubs such as the one at FPC-Boron. Accordingly, there is no need for a *qui tam* suit in the present case. The government does not need private parties to point out that Federal employees' groups are retaining vending machine profits when Congress has already addressed the issue and decided not to do anything about it.

Pet. App. 40a.

The district court determined further that because the subject matter of this action has been in the public domain by way of "discussion in Congress, in the GAO, and in the Federal courts over the past forty years, as well as appearing in publicly available BOP documents," the relators do not qualify as an "original source" as required in 31 U.S.C. § 3730(e)(4)(B). Pet. App. 40a. The court thus concluded that it lacked subject matter jurisdiction under the False Claims Act and dismissed the Complaint.[3] *Id.*

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[3] The FPC-Boron Employees' Club also argued that the acts alleged by the relators are not claims under the False Claims Act and that the Complaint itself fails to state a claim under the False Claims Act. The district court did not address either argument since it had concluded that dismissal was appropriate under 31 U.S.C. § 3730(e)(4).

3. The court of appeals affirmed.[4] In an opinion authored by Judge Patricia Wald and joined by Judges Stephen Williams and David Tatel, the court held that its

> analysis of the language, structure, history and purpose of the [False Claims Act] supports an interpretation of the public disclosure bar that limits qui tam jurisdiction to those cases in which the relator played a role in exposing a fraud of which the public was previously aware. Because we find that [petitioner] is not such a relator, we affirm the district court's dismissal of this action.

Pet. App. 4a. The court engaged in an extensive historical analysis of the purpose undergirding the False Claims Act, as well as the meaning of the language "based upon the public disclosure" codified at 31 U.S.C. § 3730(e)(4)(A), and concluded that Congress sought in the False Claims Act both to "encourage[] whistleblowing and discourage[] opportunistic behavior . . ." Pet. App. 15a, citing *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994) ("Springfield Terminal"). Pet. App. 15a.

The court of appeals further concluded that a "broader construction of the jurisdictional bar," in particular of the term "based upon," is necessary "to encompass situations in which the relator's complaint repeats what the public already knows, even though she had learned about the fraud independent of the public disclosures." Pet. App. 15a. In reaching this conclusion the court explicitly rejected a more narrow interpretation of the public disclosure bar adopted by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickenson & Co.*, 21 F.3d 1339, 1347-50 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) ("*Siller*"), as "render[ing] the 'original source' exception to the public disclosure bar largely superfluous." Pet. App. 15a.

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[4] Only petitioner appealed the district court's decision.

Applying its analysis of the False Claims Act to this case, the court of appeals identified three instances of "public disclosure" applicable here. First, the court relied upon a 1952 GAO Opinion in *Vending Machines*, B-112840, 32 Comp. Gen. 282 (1952), in which GAO noted that although the legal authority for federal employee groups retaining vending machine profits is "doubtful," GAO declined to halt the practice absent congressional intervention. Second, the court identified a 1974 Senate Report which reflects that Congress, during the process of amending the Randolph-Sheppard Act, considered complaints about the retention by employee groups of vending machine profits but did not proscribe the practice. *See* Senate Report 93-937, 93d Cong., 2d Sess. at 22 (1974). Third, the court cited the published opinion in *Texas State Comm'n for the Blind v. United States*, 796 F.2d 400, 402-03 (Fed. Cir. 1986) (en banc), *cert. denied*, 479 U.S. 1030 (1987), which discusses the historic practice of permitting federal employee organizations to utilize federal property without charge and to retain funds. Pet. App. 19a-20a. Accordingly, the court held that the petitioner's allegations concerning the retention of vending machine profits by federal employee groups "merely echoes publicly disclosed, allegedly fraudulent transactions" long in the public realm. Pet. App. 25a.

Having resolved the first prong of the statute, the court of appeals further determined that petitioner is not the "original source" of the information that federal employee groups retain vending machine profits, and thus is not entitled to an exception to the public disclosure bar. Pet. App. 25a. The court explained that to qualify as an "original source," petitioner must have both "direct and independent knowledge" of the information at issue. *Id.*; 31 U.S.C. § 3730(e)(4)(B). "Direct," according to the court, means "first-hand knowledge" and "independent" means a "relator cannot depend or rely on the public disclosures." Thus, if a relator learns of alleged fraud from a public disclosure, he or she can never be an "original source." Pet. App. 29a. Because petitioner has no "direct

and independent knowledge" of the information at issue here, the court held he cannot qualify as an "original source." Pet. App. 30a.

ARGUMENT

1. Petitioner contends that the Court should grant certiori to resolve a conflict among the circuits in the application and interpretation of the False Claims Act, in particular, the Act's public disclosure bar. There is no disputing that a circuit conflict exists. Indeed, the court of appeals in this case acknowledged as much, noting that "extensive litigation" over various terms in the public disclosure bar has ensued and that about the only thing the lower courts can agree on concerning the public disclosure bar is that "the language of the statute is not, so plain as to clearly describe which cases Congress intended to bar." Pet. App. 10a.

Notwithstanding this admission, the Court should nonetheless deny the petition for certiorari. The appellate decision at issue here is the correct result for the correct reasons. The court of appeals obviously engaged in an extensive and contemplative review of the competing goals of the False Claims Act and its *qui tam* provisions. It also carefully considered and properly rejected the Fourth Circuit's contrary interpretation of the False Claims Act in *Siller*, as essentially reading other provisions of the Act out of the statute. That conclusion is correct. Indeed, the Fourth Circuit by its own admission stands alone in its unique interpretation of the public disclosure bar. *See Siller*, 21 F.3d at 1348 ("other circuits have not embraced this [court's] interpretation" of the "based upon" term).

Specifically, under the Fourth Circuit's approach as explained in *Siller*:

> a relator's action is "based upon" a public disclosure of allegations only when the relator has actually derived from that disclosure the allegations upon which his *qui tam* suit is based.

21 F.3d at 1348. By contrast, all other circuits have "assume[d] instead that an action is based upon a public disclosure of allegations if its allegations are identical or similar to those already publicly disclosed." *Id.* Thus, in all but the Fourth Circuit, "based upon" means that where the factual basis for a *qui tam* suit is in the public domain, "regardless of whether the relator actually derived his knowledge of those facts from that disclosure," the public disclosure bar applies. 21 F.3d at 1349; *Springfield Terminal*, 14 F.3d at 652-55; *see United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992) ("based upon" applies when allegations are "the same as those that ha[ve] been publicly disclosed . . . regardless of where the relator obtained his information."); *United States ex rel. Fine v. MK-Ferguson Co.*, 99 F.3d 1538, 1545-47 (10th Cir. 1996) ("*Fine*") ("based upon" means "supported by" and court rejects *Siller's* "derived from" standard); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert. denied*, 507 U.S. 951 (1993) (same).

As the court of appeals explained in this case, the Fourth Circuit's definition of "based upon" makes no sense when viewed in the context of the False Claims Act because it effectively renders the "original source" exception in 31 U.S.C. § 3730(e)(4)(B) "superfluous." In other words, if the Fourth Circuit's approach is correct, Congress would have had no reason to enact the "original source" exception that it did enact. Pet. App. 14a-15a. Plainly the District of Columbia Circuit has the better of this argument. Because it does, this case is not the best vehicle for the Court to resolve the circuit conflict. A better vehicle, should the Court decide to resolve the conflict, would be a decision applying *Siller* that reached a questionable result on the merits.

2. The facts of this case also do not warrant a grant of certiorari. Plainly, petitioner advances no compelling reason for a grant of the writ. The essence of petitioner's

position is that because the public disclosures relied upon by the court of appeals—the 1952 GAO decision, the 1974 Senate Report and the 1986 Federal Circuit decision—do not mention the FPC-Boron Employees' Club, his complaint is not "based upon" those public disclosures. Thus, he argues, the public disclosure bar should not bar his action. Pet. 9-10.

Petitioner's argument is without merit. There is no disputing that the practice of federal employee organizations retaining vending machine proceeds has been "publicly disclosed" for forty-five years, that is, at least since the 1952 GAO *Vending Machines* decision. For the public disclosure bar not to apply on these facts, simply because the acknowledged public disclosures described the practice about which petitioner complains (keeping vending machine proceeds), but not the exact entity about which petitioner complains (the FPC-Boron Employees' Club), is both illogical and inconsistent with the language of the statute. Indeed, such a result would encourage opportunistic and parasitic *qui tam* lawsuits, something the 1986 *qui tam* statutory amendments were designed to combat. *Springfield Terminal*, 14 F.3d at 651; Pet. App. 18a.

Also important, as both the court of appeals and the district court recognized, a relator must add something to the prosecutorial equation for his or her *qui tam* suit to proceed. This means the relator must provide some additional "substantive information about the particular fraud" as opposed to "merely background information." Pet. App. 25a, quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1160 (3d Cir. 1991). As the Tenth Circuit has observed, "where public disclosure of the fraud has already occurred, no incentive for a private *qui tam* suit is needed." *Fine*, 99 F.3d at 1546. Here, because petitioner "merely echoes" already disclosed public information, and he has added nothing that would aid a federal

prosecutor interested in pursuing the alleged fraud, the public disclosure bar applies. Pet. App. 25a, 40a.[5]

3. Finally, petitioner was properly determined not to be an "original source" of the information at issue, and thus he does not come within the exception to the public disclosure bar. As noted, to qualify for this exception petitioner must possess both "independent and direct knowledge of the allegedly fraudulent activity." *Fine*, 99 F.3d at 1547; *United States ex rel. Barth v. Ridgedale Elec. Inc.*, 44 F.3d 699, 703 (8th Cir. 1995). Petitioner meets neither test since the information about which he complains has been in the public domain for at least forty-five years. Petitioner nevertheless urges that the "pertinent inquiry" is whether he is "an original source of *the allegations in his Complaint*." Pet. 17 (emphasis in original). That is incorrect. The proper inquiry, set forth in the statute itself, is whether he is an original source "of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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[5] Moreover, it must be remembered that respondents retain vending machine proceeds pursuant to the authority of the BOP Program Statement.